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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 698

UNITED STATES OF AMERICA ex rel. TONY MARINO,

Petitioner,

vs.

RALPH H. HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, CHICAGO, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Tony Marino, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, affirming the order of the United States District Court, ordering the deportation of the petitioner, for the reasons hereinafter set forth:

(a)

The majority and dissenting opinions of the United States Court of Appeals in this cause have not as yet been published in the Federal Reports, but said opinions

are attached hereto as an appendix. The decision and findings of the District Court are likewise attached hereto as an appendix pursuant to Rule 23.

(b)

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, affirming the order of the District Court dismissing the petition for a writ of *habeas corpus* filed by petitioner, were entered on December 6, 1955.

A petition for rehearing was denied January 6, 1956.

The jurisdiction of this Court is invoked on the following grounds:

(1) Under the Deportation Statute, 8 U.S.C.A. Sec. 1251, (a) (4) an alien may be deported if he "is convicted of a crime involving moral turpitude committed within five years after (his) entry." This case involves the question whether there is a legal conviction of record to support the deportation order. The majority opinion held there was a legal conviction. The dissenting opinion of Chief Judge Major held that the judgment of conviction upon which the deportation order was predicated was null and void, ineffective and "of no more force and effect than if it had been entered in the night time by the janitor of the county courthouse." (Part quoted are exact words from Judge Major's dissent.

(2) The majority decision of the Court of Appeals in this case is in direct conflict with the clear intent and meaning of the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561. The majority decision is also *sub silentio* in conflict with a decision of the the same Court of Appeals (different member) handed down recently in *U. S.* v. *Koplin,* 227 Fed. (2d) 80. The majority decision of the Court of

Appeals concludes that when petitioner was convicted of murder in 1925, he was accorded all of his constitutional rights. This Court, in *Marino* v. *Ragen,* 332 U.S. 561, at 563, said:

> "We conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires."

And, again on page 565, this Court stated:

> "This case presents a flagrant example of deprivation of due process."

The language of this Court seems so clear that it is unbelievable that a Court could not comprehend it. As Chief Judge Major states in his dissent:

> "This unprecedented performance took place under the pretext that the court did not understand the mandate issued by the Supreme Court. Whatever infirmities might have resided in the mandate, it is hornbook law that a mandate must be construed in connection with the opinion or decision of the court of issuance. With the clear, distinct and direct language employed by the Supreme Court, it bears upon the preposterous to think that any Judge, any lawyer, in fact any layman, could have misunderstood the action called for by the mandate."

Yet, such an unconstitutional conviction is the basis for this entire deportation action against the petitioner.

(3) An illegal, unwarranted and unconstitutional miscarriage of justice will result and a very dangerous precedent will be created if the decision of the Court of Appeals is permitted to stand by this Court and the petitioner is deported. In the words of Chief Judge Major:

> "Stripped of all the window dressing with which this case abounds, there emerges the simple issue as to whether Marino was convicted, in violation of his constitutional rights, of a crime involving moral turpitude, to-wit, murder. That issue has been decided

in the affirmative by the Supreme Court of the United States. Such being the case, there never has been a lawful judgment of conviction standing against Marino. It is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation. I think that federal officials should renounce rather than embrace the grievous wrong which has been done Marino by Illinois officials."

(4) The construction of the Sixth and Fourteenth Amendments to the Federal Constitution by the majority of the Court of Appeals that the right of an accused to have the assistance of counsel does not require counsel to appear in Court to represent him is contrary to the decisions of this Court.

In the case at bar, in 1925 the petitioner Marino was eighteen years of age and could not speak, read, write or understand English. He had come from Italy less than two years before. The crime was committed February 20, 1925. Petitioner was arrested February 21, 1925 and was in jail continuously to the time he was sentenced, April 25, 1925. A lawyer by the name of North saw him in jail twice, February 28, 1925 and again on March 2, 1925, and talked to petitioner through an interpreter, but never saw him or appeared for him thereafter. Petitioner was not indicted *until April 21, 1925, seven weeks later.* At no time, at the arraignment, hearing or sentencing was any lawyer ever present to advise or consult with petitioner.

Yet, the majority opinion states:

"While it is customary for counsel for a defendant in a criminal case to appear in court, his appearance there merely indicates that he believes that he will thus further the interests of his client. Such appearance is not constitutionally indispensable. If competent, retained counsel, assisting defendant, believes

that a plea of guilty should be entered and sentence imposed in the manner in which it occurred in this case, there is no infringement of defendant's rights under the sixth or fourteenth amendments of the federal constitution."

This construction and opinion is directly in conflict with decisions of this Court on this subject.

(c)

The questions presented for review are:

(1) Is there a legal conviction of record upon which to predicate an order of deportation in this case?

(2) Did the Circuit Court of Winnebago County have the right or jurisdiction to ignore the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561, and instead of granting a new trial or discharging petitioner, hold an additional hearing as to whether petitioner had been deprived of due process on his original trial, when this Court had already decided that he had been deprived of due process?

(3) Are the Sixth and Fourteenth Amendments guaranteeing to an accused the right to assistance of counsel satisfied if no counsel appears in court for the accused at any stage of the proceedings and where accused has not had advice of counsel for seven weeks prior to his indictment?

(d)

8 U.S.C.A. Sec. 1251, (a)(4), page 358, provides:

"Any alien in the United States shall upon the order of the Attorney General, be deported who: * * * (4) is convicted of a crime involving moral turpitude committed within five years after entry and

either sentenced to confinement or confined thereafter in a prison or corrective institution, for a year or more."

(e)

STATEMENT OF THE CASE.

The petitioner, Tony Marino, an alien, was legally admitted to this country from Italy for permanent residence on November 11, 1923. (Trans. 114) (Because Marino was financially unable to provide a printed transcript of record, the Court of Appeals permitted us to use the original transcript of record on appeal. The original transcript has been filed in this Court.)

He was sixteen years old at the time. On February 20, 1925, he apparently shot one, Patterson, under circumstances not clear from the record. On February 21, 1925, he was arrested and remained in jail continuously until he was sentenced to life imprisonment for murder on April 25, 1925. Petitioner could not read, write, speak or understand English. A lawyer named North talked to him through an interpreter on February 28, 1925 and again on March 2, 1925. At no other time did Mr. North or any lawyer, consult with him nor did any lawyer ever appear in court for him.

On April 21, 1925, petitioner was indicted. On April 23, he was arraigned. No lawyer was present and apparently a plea of guilty was entered for him. On April 24, 1925, still without a lawyer present, the court heard evidence as to mitigating circumstances on his purported guilty plea. On April 25, 1925, a Saturday, the petitioner, still with no lawyer, was sentenced in open court to life imprisonment. (Trans. 60-65)

On January 6, 1947, after twenty-two years in the penitentiary, petitioner filed a petition for a writ of *habeas*

corpus in the Circuit Court of Winnebago County, Illinois, alleging *inter alia* that at the time of his arrest and trial in 1925 he was eighteen (18) years of age; that he did not at that time read, write, speak or understand the English language; that he did not sign a jury waiver and did not enter a plea of guilty; that he was without the advice of counsel; that impartial interpreters were not used; that he was denied a fair and impartial trial; that he was denied due process of law and that the judgment was void. The Circuit Court of Winnebago County quashed the writ and petitioner addressed a petition for a writ of certiorari to the Supreme Court of the United States. (Tr. 114).

The Attorney General of the State of Illinois filed a confession of error in the United States Supreme Court stating that no attorney appears to have been appointed for petitioner before he was sentenced to life imprisonment on April 25, 1925; that no plea of guilty ever appears to have been entered before the trial court in petitioner's trial and that it appears that the waiver on record purportedly signed by the petitioner was, in fact, not signed by him. (Tr. 161) The Attorney General's confession further stated that petitioner was only eighteen (18) years old at the time of his original trial, that he had entered the United States from Italy, his native land, only two years prior to his trial and that at the time of his trial he did not understand the English language and it is doubtful he understood American trial court procedure (Tr. 161); that it appears that Daniel Torreo, the person who appeared as interpreter for the petitioner at the original trial, was in fact the police officer who arrested the petitioner (Tr. 161); that Torreo testified at the *habeas corpus* hearing and stated that there was another interpreter by the name of Joseph Carrado, who explained to the

petitioner his rights but that the record fails to disclose Carrado as an interpreter (Tr. 161); that the facts in this case appear to be a more flagrant denial of due process than the facts in other cases where the court has held there has been a denial of due process of law.

The Attorney General of Illinois confessed error in these words:

> "The Attorney General therefore joins in asking this court to grant its writ of certiorari, confesses error, and consents that the judgment of the Circuit Court of Winnebago County may be reversed by this court without further brief, arguments or other proceedings in this cause.
>
> "The Attorney General is willing that this be done as soon as possible in order to correct a very evident failure of due process in petitioner's original trial." (Tr. 162)

This Court then stated in *Marino* v. *Ragen*, 331 U.S. 561, at 563:

> "The common-law record recites that petitioner was arraigned in open court and advised through interpreters of the meaning and effect of a plea of guilty and that petitioner signed a statement waiting jury trial and pleading guilty. He was sentenced to life imprisonment. It does not appear, however, that an attorney was appointed to represent him. The waiver was not in fact signed by him, and no plea of guilty was entered at the trial. He was 18 years old at that time and had been in this country only two years. He did not understand the English language and it is doubtful that he understood American trial court procedure. The arresting officer served as an interpreter for petitioner at the original trial.
>
> "The State of Illinois speaking through the Attorney General admits the foregoing facts, confesses error, and consents to a reversal of the judgment below."

The court then summarized, at page 563:

> "We conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires."

Instead of granting a new trial as this Court apparently ordered, the Circuit Court of Winnebago County held a hearing to determine whether or not petitioner had received a fair trial originally. (Trans. 96, ff).

This was done although a full hearing had already been had. Twice this Court said in *Marino* v. *Ragen* that "after a hearing", the original writ was quashed by the Winnebago Court. The Attorney General in his confession of error spoke of a hearing. (Tr. 161) The Immigration Appeal Board also found that there had been a hearing. (Tr. 121)

Yet, the Winnebago Court, instead of granting a new trial, had a hearing to determine what the Supreme Court of the United States had already determined, namely, whether Marino had received a fair trial. The Winnebago Court found, as it had made up its mind to find in order to circumvent this Court's order that Marino had received a fair trial, stating:

> "I am of the opinion that all of the constitutional rights of the defendant were according to him." (Tr. 102)

He then quashed the writ of *habeas corpus* and remanded the petitioner to the penitentiary on May 17, 1948. (Tr. 115)

The Winnebago Court made his ruling despite an unprecedented motion by the Attorney General of Illinois that Marino be discharged. In the words of the Attorney General, which may well serve as our brief in this cause:

"(3) From a transcript of the proceedings had in this cause, the above mentioned confession of error, and the opinion of the Supreme Court of the United States, it appears that:

"Petitioner was indicted in this Court in the year 1925 for the crime of murder. He was illegally arrested in Wisconsin, illegally transported to Winnebago County, illegally held incommunicado for such a length of time that any purported confession made by him was illegally obtained, was arraigned upon said indictment, was at that time eighteen years of age and unable to speak the English language, and was not tendered counsel, nor did the court hold any hearing or proceedings in the nature of an inquiry as to whether he was competent intellectually to waive counsel; that one of the interpreters through whom his arraignment was conducted, was the police officer who took his confession while he was held incommunicado, as aforesaid, and that, thereupon, it being made to appear through the interpreter that the petitioner pleaded guilty, he was adjudged guilty of the crime of murder and sentenced to imprisonment for the rest of his natural life."

"(4) Upon these undisputed facts, the Supreme Court of the United States has declared this petitioner was convicted of murder and sentenced to life imprisonment upon such conviction in violation of his rights under the Constitution of the United States.

"In consequence of the premises, it became the duty of Max Weston, State's Attorney of Winnebago County, immediately upon the filing of the mandate aforesaid, to appear before this Court and move for the entry of a judgment order discharging the petitioner from the custody of the Warden of the Illinois State Penitentiary. Max A. Weston, State's Attorney, has failed and refused to do his duty in this regard.

"(5) The Attorney General of Illinois, on behalf of the People of the State of Illinois, makes this motion, not in the interests of petitioner as an individual, but because he considers that the violation of

the Constitutional rights of any person is tantamount to an attack on the rights and freedom of every inhabitant of the State of Illinois.

"Wherefore the People of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, moves the Court to enter a judgment order in accordance with the mandate of the Supreme Court of the United States in this cause." (Tr. 155-156)

Thereafter, Marino, being again confined in the penitentiary, filed a series of contemporaneous petitions for mandamus, certiorari, etc., in the Supreme Court of Illinois and in this Court (336 U.S. 969) all of which were denied for technical reasons. (Tr. 115, 127, 130) By this time, the State of Illinois had already enacted its new Post-Conviction Act (August 4, 1949) and this Court undoubtedly wanted Marino to proceed for relief in the State Courts. On July 10, 1950, Marino was released on parole after serving twenty-five years. (Tr. 115)

The Immigration Authorities thereupon instituted action to deport him because he was "convicted" of this crime.

The deportation hearing officer in his report (Tr. 116) handed down September 12, 1951, found that petitioner was forty-four years of age, single, with no close relatives in the United States except an aunt and some cousins. His parents are deceased. He has no one dependent upon him for support. He is now employed as a checker for a transportation line and his average weekly earnings are $85.00. His assets then consisted of $1700.00 in bank deposits. (Tr. 116)

The hearing officer further stated in his report that he had no authority to exercise any discretionary grounds for relief which power is vested in the Attorney General of the United States. Accordingly, he recommended that petitioner be deported. (Tr. 116-118)

The cause was argued before the District Judge on February 17, 1955, on the petition and the return. No evidence was heard by him. (Tr. 139)

On March 17, 1955, the District Judge entered his findings of fact and conclusions of law and dismissed the petition for a writ of *habeas corpus*. (Tr. 140-144)

The essence of the Court's finding is "that the subsisting judgment of the Circuit Court of Winnebago County, State of Illinois, finding that the petitioner convicted of the crime of murder committed on February 20, 1925, is not subject to collateral attack in this proceeding." (Tr. 144)

A judgment order dismissing the writ of *habeas corpus* and remanding the petitioner to the Immigration Department for deportation was entered on March 14, 1955. Petitioner was permitted to remain at large by continuing the $1,000 bond pending the disposition of this appeal. (Tr. 145)

An appeal to the United States Court of Appeals followed. Then in a two to one decision, that Court affirmed the District Court.

This Petition for a Writ of Certiorari brings the matter up for review and decision by this Court. We respectfully submit that the decision of the Court of Appeals departs so widely from the decision of this Court in *Marino* v. *Ragen*, 332 U.S. 561, and from acceptable decisions and principles laid down by this Court that a review of this case is indispensable.

(g)

The Federal District Court has jurisdiction on *habeas corpus* to review deportation proceedings.

(h)

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

Where the Supreme Court has found that a person convicted of a crime "was denied the due process of law which the Fourteenth Amendment requires", such finding is res adjudicata and binding upon the trial court, and such person is entitled to a trial de novo and not to a new hearing as to whether the Supreme Court finding is correct. Such a conviction is illegal and void and will not support a deportation order under 8 U.S.C.A. Sec. 1251 (a)(4), page 358.

Marino v. *Ragen*, 332 U.S. 561, 92 L. Ed. 170, 68 Sup. Ct. 240.

The majority on the Court of Appeals has emphasized every technicality, has indulged in every inference, and has adopted every assumption which might tend in any way to show that Marino received a fair trial in 1925. Even if this Court had not decided that Marino had not received a fair trial, the record, the more closely it is scrutinized, shows that he did not receive a fair trial.

No counsel was in court for him at any time. No conference with a lawyer was had from a period seven weeks before he was indicted to his sentencing. The arresting officer was the interpreter. No guilty plea appears on the common law record. These facts alone show how lacking in due process was his conviction.

But these facts are no longer open to dispute. The State of Illinois, through its Attorney General, admitted that his conviction was void and that he should be discharged or granted a new trial. This Court so found.

There had already been a full and complete hearing on the *habeas corpus* petition in the Circuit Court of Winnebago County. Surely, this Court would not remand the case for further hearing. As Judge Major points out in his dissent, it would be preposterous to do so. Yet, that is what the Winnebago Court did.

The majority opinion, in its zeal to support the Winnebago Court decision, makes the distinction that this Court in *Marino* v. *Ragen,* 332 U.S. 561, did not "reverse" the judgment but rather "vacated" the judgment and remanded the case. Surely, this Court will not sanction the deportation of an alien on a conviction branded as "a flagrant violation of due process" on the use of the word "reverse" instead of "vacate". Whichever word is used, the judgment affected cannot stand.

The majority opinion further invokes a new technical doctrine to sustain its position. The common law record reveals that no guilty plea was ever entered by Marino. But the Court says it would examine the docket of the trial judge and since the trial judge's docket shows a guilty plea, the record need not show it. In support of this argument, the majority opinion refers to *The People* v. *Nierstheimer,* 396 Ill. 193, 71 N.E. (2d) 157 and says that this Court denied certiorari in the latter case. 330 U.S. 841.

Of course, this Court denied certiorari in *People* v. *Nierstheimer,* 330 U.S. 841 because it involved the technical question of the validity of the *commitment order of the defendant to an insane asylum after judgment of conviction,* and did not even purport to involve the basic constitutional requirement of a plea of guilty or not guilty, which is a jurisdictional prerequisite to every conviction. We know of no case in any jurisdiction which

holds that a plea of guilty need not appear in the record and that it is sufficient if it appears in the personal notations or minutes of the trial judge. We can conceive of nothing more important than a clear and unequivocal record of a guilty plea, the effects and the entry of which are clearly explained to the accused through an unbiased interpreter *and* with the defendant's counsel in the courtroom. This admittedly did not occur at the original trial of Marino in 1925.

The majority of opinion interposes a further assumption that is not supported by the record. The majority opinion states that Judge Dusher found (at the second hearing), that Marino had the assistance of counsel; that friends of Marino had retained a Mr. North, "one of the best and most prominent lawyers in the northern part of Illinois"; that Mr. North's retainer continued until the sentencing of Marino.

Yet, the opinion concedes that Mr. North last visited Marino in jail on March 2, 1925; that he never saw Marino thereafter; that he never appeared in court for Marino at any time; that Marino was not indicted and arraigned until April 21, 1925 which is seven weeks after he last saw Mr. North; that the original trial judge knew that no lawyer was appearing for Marino; that the Court did not appoint a lawyer to advise Marino on April 21, 1925 or at any subsequent hearing. Is this representation by, advice of or assistance of counsel?

To escape from this dilemma, the majority opinion then states categorically that an actual court appearance of counsel is not necessary. In the case at bar and under the existing facts it was mandatory and the Attorney General of Illinois so admitted and this Court so found. *Marino* v. *Ragen*, 332 U.S. 561.

The majority opinion of the Court of Appeals then condoning the action of Mr. North, the lawyer, not appearing at any hearing, indulges in this fantastic assumption wholly *dehors* the record:

> "It may well have been that North, in considering the heinousness of the crime with which his client was charged, believed that the entry of a not guilty plea followed by a trial would result in a more severe punishment than what might be expected from a judge on a plea of guilty and a submission by the defendant personally to the mercy of the Court."

The fact is that Marino shot in self defense when one, Patterson, approached him with his hand on hip as if to pull a gun. There was nothing vicious, premeditated or heinous about this crime. Surely, the majority opinion in indulging in assumptions outside the record is injecting new facts in the record which emphasizes the unfairness of Marino's so-called trial. If this was such a heinous crime, why did not attorney North either appear or withdraw? Why did he not at least consult with Marino after March 2, 1925? Why did not the judge appoint or attempt to appoint a lawyer to represent Marino on April 21, 1925, April 23 or April 25, 1925, the date of the arraignment, the date of the hearing and the date of the sentencing, respectively? It was *less than four days from the indictment to the sentence.* We have cited the foregoing to show how far the majority opinion has gone astray to support Judge Dusher as against the Supreme Court of the United States. We submit that Chief Judge Major in his sharp dissent sets forth the true picture that Judge Dusher was determined that Marino must not get a new trial at all costs. Judge Major points out in his dissenting opinion:

> "Apparently, however, smarting under the castigation administered by one of the members of the Supreme Court, the state court refused to execute

the mandate. The action by that court which followed demonstrates not only a callous indifference to the decision of the Supreme Court but constitutes a scathing indictment of the honesty, integrity and good faith of the highest prosecuting official of the State. To the credit of the Illinois Attorney General, however, it should be noted that he, with courage and deference to the decision of the highest tribunal in the land, made a valiant effort to persuade the state court to follow and execute the mandate. No subterfuge was employed by that official as a pretext to do otherwise. As might be expected, he understood the decision of the Supreme Court, its mandate and what it called for."

No useful purpose would be served by pointing out in further detail how erroneous the majority opinion is. The decisive fact is that this Court found in *Marino* v. *Ragen*, 332 U.S. 561, that Marino was deprived of due process at his first trial. He was entitled to discharge or a new trial. He received neither. He merely received a further hearing to decide that this Court was wrong. Judge Dusher of the Circuit Court of Winnebago County, who was reversed by this Court, showed his utter defiance of the ruling of this Court when he was requested by the Attorney General of Illinois to discharge Marino in these words:

"I don't believe the law enforcement officers of the State of Illinois are quite as black as Mr. Rutledge painted them; neither do I think the law of Illinois is as bad as painted. The legislature had seen fit to establish a Board of Pardons & Paroles and if Marino has been punished more than he should have been, that is up to the Board of Pardons & Paroles but this court is required to follow the law as stated in the acts of the legislature and the decisions of the supreme court of Illinois and in the light of the mandate from the United States Supreme Court I think it is proper that this court inquire into

the entire matter and determine whether or not the attorney-general properly confessed error before the United States Supreme Court. "* * * Motion of the People of the State of Illinois for entry of judgment in accordance with the mandate of the Supreme Court heard and motion denied." (Tr. 151)

We respectfully submit that this Court found that Marino's conviction was in violation of due process and null and void. Therefore, there is no conviction of record and the deportation proceedings predicated upon such conviction must fall.

II.

Where an illiterate eighteen year old minor, unable to speak or understand English, is accused of a capital offense, and no lawyer represents him in court at any stage of the proceedings, and the last contact with a lawyer is more than six weeks before his indictment while incarcerated in jail, he has not received the right to have assistance of counsel guaranteed him by the Sixth Amendment, and a conviction obtained under such circumstances is null and void.

Hawk v. *Olson,* 326 U.S. 271, 276; 90 L. Ed. 61; 66 S. Ct. 116, 119.

Johnson v. *Zerbst,* 304 U.S. 458; 82 L. Ed. 1461; 58 S. Ct. 1019.

Von Moltke v. *Gillies,* 332 U.S. 708, 722; 68 S. Ct. 316, 322; 92 L. Ed. 309.

Powell v. *Alabama,* 287 U.S. 45, 69; 77 L. Ed. 158; 53 S. Ct. 55, 64.

Glasser v. *United States,* 315 U.S. 60, 76; 62 S. Ct. 457, 467; 86 L. Ed. 680.

United States v. *Koplin,* 227 Fed. (2d) 80, Seventh Circuit.

The majority opinion expounds one of the most dangerous and incredible theories in criminal law by saying that

the presence of counsel for the accused in the courtroom is not necessary and that the Sixth Amendment does not require it.

It is conceded that at no time in the trial court proceedings was Marino represented by counsel—either at the arraignment or at the trial or at the sentencing. In an extraordinary case, it is conceivable that an accused, who has the constant benefit of advice of counsel, and whose counsel is ill at some of the proceedings and therefore not in court, might not complain of this fact.

But, in the case at bar where an illiterate, ignorant minor, eighteen years old—accused of a capital offense, *has no counsel for seven weeks prior to the arraignment* and no lawyer represents him at any time in court, he cannot be said to have had assistance of counsel required under the Sixth Amendment.

This Court has spoken in no uncertain terms on the vital necessity to have adequate and competent counsel at all times. The words of this Court speak more eloquently than anything we can say.

Hawk v. *Olson,* 325 U.S. 271, 276; 90 L. Ed. 61; 66 S. Ct. 116, 119.

Johnson v. *Zerbst,* 304 U.S. 458; 82 L. Ed. 1461; 58 S. Ct. 1019.

Von Moltke v. *Gillies,* 332 U.S. 708, 722; 68 S. Ct. 316, 322; 92 L. Ed. 309.

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Glasser v. *United States,* 315 U.S. 60, 76; 62 S. Ct. 457, 467; 86 L. Ed. 680.

Indeed, this very Court of Appeals, in a recent case, *United States* v. *Koplin,* 227 Fed. (2d) 80, (speaking through Chief Judge Major, Judges Swaim and Platt concurring) reversed and remanded a judgment of con-

viction because the district judge forced a defendant to trial when his own counsel claimed to be engaged even though he appointed as the accused's attorney an associate of defense counsel.

The language and the decision of the Court of Appeals is contrary to the established law laid down by this Court and in conflict with decisions of the same Court of Appeals with different judges sitting. It is no wonder that we find Chief Judge Major in his dissent using such words as "unprecedented performance", "it bears upon the preposterous to think that any Judge, any lawyer, in fact any layman could have misunderstood the action called for by the mandate" of this Court, and "it is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation."

III.

Where the Attorney General of Illinois has filed a confession of error and the Supreme Court of the United States has accepted the confession of error as true, it is just as conclusive and binding on the parties as if the court has heard the case on evidence and a complete record.

Young v. *United States,* 315 U.S. 257; 62 S. Ct. 510; 86 L. Ed. 832, distinguished.

The Court of Appeals' majority opinion to sustain its decision states that after all this Court, in *Marino* v. *Ragen,* 332 U.S. 561, decided the case on the Attorney General of Illinois' confession of error and not upon a hearing of evidence. And the Court of Appeals cites *Young* v. *United States,* 315 U.S. 258, that a confession of error is not conclusive. Surely, this Court could have said, "We do not believe nor accept the Attorney General's confession of error." But this Court did accept it, relied upon it, and acted upon it. Once this Court ac-

cepted the confession of error, it is just as conclusive and binding on the parties as if the Court had heard thousands of pages of testimony. A judgment rendered on the pleadings or upon a stipulation of fact is just as binding as a judgment rendered in a case where fifty witnesses are heard. Chief Judge Major expressed this principle succinctly in his dissenting opinion:

> "Of course the Supreme Court and no other Court is bound to render a decision on a confession of error, or upon an agreement or stipulation of the parties, but when it does so its decision, so far as I am aware, carries no less weight than if it had been made on a complete record."

The majority opinion ignores the fact that there was a full hearing on the original habeas corpus petition before Judge Dusher in the Circuit Court of Winnebago County, Illinois. Twice in its opinion in *Marino* v. *Ragen*, 332 U.S. 561, this Court uses the words "after a hearing." It would have been absurd for this Court to remand the case for further hearings when a full hearing had already been had.

The majority opinion seeks sustenance in the fact that this Court on May 2, 1949 denied Marino's petition for certiorari seeking to review Judge Dusher's quashing the writ of *habeas corpus*. *Marino* v. *Ragen*, 336 U.S. 969.

But the reason why this Court denied certiorari was because Marino had not exhausted his remedies in the State Courts, and also because he had a remedy by appeal under the new Illinois Post Conviction Law. This Court has never passed upon the refusal of Judge Dusher to follow the mandate of this Court in 332 U.S. 561. The Court of Appeals' majority opinion in this case states:

"Justices Douglas, Murphy and Rutledge were of the opinion that certiorari should have been granted. They are the same justices who joined in a concurring opinion in *Marino* v. *Ragen,* 332 U.S. 561."

The majority opinion of the Court of Appeals draws an unwarranted conclusion from the foregoing. In denying certiorari in 336 U.S. 969, on Marino's petition, this Court, in effect, refused to act until Marino had exhausted his remedies under Illinois law. On the contrary, three justices were willing to grant certiorari even though he had not exhausted his remedies under Illinois law, and even though he was prematurely and improperly seeking relief in this Court.

The validity of the action of Judge Dusher in refusing to follow the mandate of this Court has never been directly in issue until this proceeding. This is the first time that this Court has had an appropriate opportunity to pass upon Judge Dusher's defiance of its mandate. The Court of Appeals has committed the gravest error in holding that there is a valid conviction of record when this Court has decided otherwise.

CONCLUSION.

The decision in this cause is contrary to the decision of this Court and to another decision of the same Court of Appeals (different members).

The dissenting opinion of Chief Judge Major is so vigorous and uncompromising because if the majority opinion is allowed to stand, it will completely change the the meaning of the Sixth Amendment and "advice and assistance of counsel" as interpreted by this Court. It will result in the grossest miscarriage of justice that has come

to our attention in more than a quarter of a century at the bar. It will encourage defiance of this Court's mandates.

The petitioner, Tony Marino, to be deported must have been lawfully convicted. On December 27, 1947, this Court decided in *Marino* v. *Ragen*, 332 U.S. 561, that his conviction was unlawful because he "was denied the due process of law which the Fourteenth Amendment required". Admittedly, he has never been re-tried since that date. Hence, there is no legal conviction of record. Any "further hearing" or other action by a court cannot change the record.

Petitioner therefore respectfully prays that a writ of certiorari issue forthwith to the United States Court of Appeals, Seventh Circuit, to bring this cause to this Court for review, and that upon such review the judgments of the said Court of Appeals and the District Court be reversed and the petitioner be discharged.

Respectfully submitted,

IRVING GOODMAN,

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EMIL CALIENDO and

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NATHAN B. ENGELSTEIN,

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Attorneys for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals.

No. 11483. October Term, 1955—October Session 1955.

United States of America, ex rel. Tony Marino,
Petitioner-Appellant,
vs.
Ralph H. Holton, District Director, Immigration and Naturalization Service, Chicago, Illinois,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 6, 1955.

Before Major, Lindley and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* The district court dismissed a writ of habeas corpus which it had issued on the petition of Tony Marino, and remanded him to the custody of respondent's predecessor, District Director of the Immigration and Naturalization Service of the United States, who had custody of petitioner when the writ was issued, under a warrant for his deportation to Italy from whence he had emigrated to the United States in 1923. The warrant was issued March 2, 1926 on a charge, *inter alia,* that he had been sentenced to imprisonment for a term of one year or more because of conviction in the United States of a crime involving moral turpitude, to wit: murder, committed within five years after his entry[1].

[1] The statute in effect in 1923 to June 27, 1952 inclusive was 39 U. S. Stat. at Large, 889. The statute in effect June 27, 1952 to and including the present time is 8 U. S. C. A. § 1251 [see paragraph (a)(4)].

From the district court's order Marino appeals to this court.

Marino's said petition for writ of habeas corpus, filed May 15, 1951, alleged that a judgment of conviction was entered in the Circuit Court of Winnebago County, Illinois, on April 30, 1925, and he was on that day sentenced to life imprisonment and delivered to the warden of the Illinois State Penitentiary; that about 25 years later he filed in said court a petition for habeas corpus, "but was denied relief;" that he thereafter "obtained certiorari from the Supreme Court of the United States" and that "The Attorney General of the State of Illinois confessed error," as a result of which the judgment of the trial court in the habeas corpus case was "vacated and the cause was remanded"[2].

The petition set forth that it appears from the opinions in the latter case that "the murder conviction * * * was void, for the reason that your petitioner was denied due process of law which the Fourteenth Amendment requires." Specifically petitioner averred that he "had no attorney at the trial," and:

> "Although the common law record recites that petitioner was arraigned in open court and advised through interpreters of the meaning and effect of a plea of guilty and that petitioner signed a statement waiving trial by jury, the Attorney General of Illinois admitted and the Supreme Court found, that the waiver was not in fact signed by your petitioner. No plea of guilty was entered at the trial. Your petitioner was 18 years old at the time and had been in this country only two years. Your petitioner did not understand English or court procedure. The arresting officer served as an interpreter for petitioner at the trial."

Petitioner further alleged that "upon remand to the trial court the judge again denied relief," and that petitioner again asked the Supreme Court to grant certiorari, but

[2] Marino v. Ragen, 332 U. S. 561.

his petition was denied.[3] Petitioner also averred that on July 8, 1950 he was granted a parole,[4] at which time he was turned over to the immigration authorities.

Respondent's predecessor as district director filed a return to the writ of habeas corpus, setting forth that the warrant of deportation was issued following a hearing accorded to petitioner. Following the issuance of the writ, and with the consent of the district court, a new administrative hearing was granted to petitioner, for the purpose of bringing the record up to date. At this hearing on August 21, 1951, petitioner was represented by his counsel. As a result thereof the immigration hearing officer decided that "in view of the fact that the Petitioner's conviction of the crime of murder still stands, he is subject to deportation on the charge." Accordingly, the assistant commissioner entered an order for deportation which, as later amended, was affirmed by the Board of Immigration Appeals on August 29, 1952, and on October 10, 1952 a warrant of deportation was issued.

The return also includes a transcript of the hearing of August 21, 1951, including a stipulation by Marino and his attorney, and the examining officer, qualifying the admission of records pertaining to Marino's conviction. These documents include the common law record, showing a filing on April 21, 1925, in court before Judge Earl D. Reynolds of an indictment of Marino by the Winnebago County grand jury on April 17, 1925, charging him with the murder by shooting of Charles E. Patterson; that on April 21, 1925 he was furnished with a copy of the indictment and lists of witnesses and jurors, and remanded to custody of the sheriff for plea; his appearance in open court on April 23, 1925, when the court explained "fully to said Defendant through interpreters, * * *, the meaning and effect of a plea of guilty and the punishment which the Court can render in a case of this character." The court record proceeds as follows:

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[3] Marino v. Ragen, 336 U. S. 969. He stated "no reasons were given for this denial, but your petitioner assumes that it was because of the creation of a new remedy by the State of Illinois for prisoners."

[4] On August 4, 1949, Illinois' new Post-conviction act took effect. Sec. 826, et seq., Ch. 38, Ill. Rev. Stat. 1953.

"After such explanation, said Defendant, Tony Marino alias Toni Marino, files a written waiver of a trial by jury to the charge in the indictment.

And now said Defendant is remanded by the Court to the custody of the Sheriff for hearing of evidence as to mitigating circumstances before passing a sentence."

Included in the record of the same date is a typewritten paper purporting to bear Marino's signature and reading as follows:

"And now comes the above named defendant, in his own proper person, and waives trial by jury in the above entitled cause, and enters a plea of guilty, and requests the above named judge of the Circuit Court, or such judge of the Circuit Court as may be called upon to hear the above entitled cause upon a change of venue from above named Judge of the Circuit Court, if one should be granted, to try said cause without the intervention of a jury."

The record further shows that on April 24, 1925 the

"Court on own motion hears evidence as to the mitigating circumstances before passing sentence upon the plea of guilty of said Defendant.

And after having heard said testimony the Court takes the matter under advisement, and said Defendant is remanded to the custody of the Sheriff for sentence."

The record also shows that on April 25, 1925 Marino, who, the court found, was 20 years of age, was sentenced to the penitentiary for the term of his natural life.

The documents admitted by stipulation include the record of a habeas corpus proceeding filed by Marino in the Circuit Court of Winnebago County, on January 6, 1947. His petition alleged that he was "not given any papers of any kind" at the hearing before Judge Reynolds on April 21, 1925, that "no one spoke to him or asked him any questions at this hearing," that he did not on April 23, 1925 sign a jury waiver, that "the record *shows*[4a] that

[4a] Italics on this page are furnished for emphasis.

petitioner did not enter a plea of guilty" and that "he was not warned of the consequences" thereof, that he did not persist in the plea of guilty," that the court "used biased interpreters to translate the proceedings in this case to petitioner and the trial court," and used interpreters on April 23, 1925 only, that the court "did not appoint counsel to represent petitioner," and that "petitioner was without the advice of counsel from the date of his arrest until he entered this prison."

The same petition also sets forth "that the record does *not show*" that "the alleged plea of guilty * * * was received and recorded, as required by law," that the trial court informed him of "his constitutional right to have a jury trial," or that the trial court informed him of "his constitutional right to enjoy the assistance of counsel." It further alleges that petitioner "did not competently, intelligently, or understandingly waive a jury trial or enter a plea of guilty to the indictment in this cause, that in fact there was no waiver of a jury trial or a plea of guilty entered in this cause by petitioner," that petitioner "was denied a fair and impartial trial," and that "the judgment * * * is absolutely void."

The documents admitted by stipulation also include a transcript of certain proceedings before Judge Dusher of the Circuit Court of Winnebago County following the filing in that court on January 26, 1948 of the mandate in *Marino* v. *Ragen,* 332 U. S. 561.[5] These proceedings show that Judge Dusher construed the mandate to mean that the court "should have a full and complete hearing of what transpired" in the murder case and "determine whether or not the petitioner received a fair trial * * *, or if he was deprived of any of his constitutional rights." He heard evidence and considered the common law record and

[5] On February 16, 1948 the attorney general of Illinois made a motion in the circuit court that it enter an order in accordance with the mandate, contending that the court should have then discharged Marino from custody. The motion was denied. The attorney general thereupon filed in the United States Supreme Court a motion "for such order as shall plainly direct the action of the Circuit Court in obedience to this Court's mandate in this case." The Supreme Court denied this motion. 333 U. S. 852.

also the trial judge's docket. He found by "a clear preponderance of the evidence, even beyond any reasonable doubt," that Marino did sign "this jury waiver; that he was advised of its contents and in it there is a plea of guilty; that Marino testified falsely when he said he did not sign this waiver of jury." He further found that the "common law record together with the judge's docket[6] shows that a plea of guilty was entered and that Marino was advised of his statutory and constitutional rights."

As to Marino's representation by counsel, the court found that within a day after Marino's arrest his friends retained for him attorney Harry B. North, one of the best and most prominent lawyers in the northern part of Illinois, who on February 28, 1925 spent two and one-half hours with Marino. Before Judge Dusher Marino denied that he ever saw North. Judge Dusher declared Marino's testimony on this point to be a falsehood. Another witness, Manilli, testified that he was present at that time and acted as an interpreter between attorney North and Marino. The court also found from the evidence that on March 2, 1925, the same attorney spent two hours with Manilli and Marino. As to what was said between Marino and his counsel on these occasions, the court, because of the privileged character of the communications, did not interrogate the witness, stating that "the petitioner didn't want it gone into." He respected the privilege of nondisclosure of what actually transpired between North and his client. The court further found that the evidence showed "without any question that North remained under the retainer that had been paid to him until the day that Marino had his hearing on mitigation and aggravation," that it is undisputed, and petitioner did not deny, that before that hearing Marino said that he did not want a

[6] Judge Reynolds made the following entry in his docket:

"April 23, 1925.

Defendant in Court in person. Court explains fully to said defendant thru interpreters Daniel Torrisi & Joe Marino meaning & effect of entry of plea of guilty & punishment Court can render in a case of this character. After such explanation, defendant files written waiver of trial by jury & enters plea of guilty to charge in the indictment."

lawyer and that he wanted to plead guilty and throw himself upon the mercy of the court.

Judge Dusher after hearing the evidence was of the opinion that Marino had the benefit and advice of counsel.

As to the credibility of Marino as a witness, the court pointed out that Marino said "last Saturday, that he didn't shoot Patterson." While appearing before the parole board he stated that he shot Patterson three times, but in April 1947 he told the examining officer of the Illinois Division of Correction that he "didn't remember."[1]

Judge Dusher quoted from a letter which Marino wrote to the state's attorney of Winnebago County in which he said that he "was sentenced to life imprisonment because I had no one in this country who could honestly advise me what to do with the court's proceedings, * * *." The evidence before Judge Dusher showed that on the second day he was in the county jail there were numerous "Italian" persons who called on him, and that at the time of his confession Mr. Corado, manager of the telephone company, a young man named Greely, Joe Marino, Manilli, and another man, were all present.

The court came to the conclusion "as a matter of fact, that Marino did have the benefit of the advice of counsel, * * * his friends putting up their money for the purpose of hiring a lawyer." Judge Dusher found that Judge Reynolds "was zealous to protect the rights of this defendant," and that there was "a hearing on mitigation and aggravation" which constituted 66 pages of testimony taken before the court. The court concluded as a matter of fact that Marino "was fully advised at the time he made the confession" and that "he knew absolutely all of his rights and that he did just exactly what he said he wanted to do—he wanted to plead guilty and put himself on the mercy of the court." Judge Dusher was of the opinion that when

[1] Before the immigration hearing officer, on August 21, 1951, he testified that he met un unknown man on the streets of Rockford, who spoke to him, and he thought that the man was going to kill him, "so I pulled my pistol and killed him. * * * I never saw him before."

"defendant appears before the court with his lawyer, that it is presumed by the court that his lawyer has explained to him all of his rights under the law and under the constitution. The actual appearance in court with a lawyer is in large measure a formality after the lawyer has advised the defendant concerning his rights. It seems to me that the vital thing is whether or not a defendant has had the advice of counsel previous to a plea of guilty. It does not seem to me that it is vital to the rights of the defendant that his lawyer actually stand with him in court before the judge at the time a plea of guilty is entered or at the time of sentence on a plea of guilty."

The court concluded that "there is no question in my mind but what Marino had been fully advised of his rights, under the law and under the constitution, by Mr. North and that when he stood before the trial judge in the murder case he had been fully advised and had the benefit of the advice of counsel at the time he plead guilty."

The court thereupon quashed the writ of habeas corpus.

To review this action, Marino filed a petition for certiorari in the Supreme Court of the United States, which was denied on May 2, 1949. 336 U. S. 969. Justices Douglas, Murphy and Rutledge were of the opinion that certiorari should have been granted. They are the same justices who joined in a concurring opinion in *Marino* v. *Ragen*, 332 U. S. 561.

Marino's said 1947 petition for habeas corpus filed in the Circuit Court of Winnebago County charged that, during the proceedings in that court on the murder indictment in 1925, he was deprived of certain constitutional rights. Certiorari to review the action of the circuit court adverse to Marino brought the petition before the United States Supreme Court, where a confession of error by the Illinois attorney general was filed stating facts appearing on the common law record of the murder proceeding and also

aliunde that record[8]. The opinion of the Supreme Court[9] indicates that on the facts admitted on the record then before it, Marino was entitled to relief. Whether the charges of violations of his constitutional rights were well founded as a matter of fact did, however, remain undetermined. The Supreme Court vacated the circuit court's judgment quashing the writ, and remanded the case to that court.

Following the remandment the circuit court reopened the case and heard evidence, as above related. It does not appear that the attorney general offered any evidence. He did attempt to prevent the hearing by making a motion that the court enter an order, in effect, discharging Marino. When the motion was denied, he moved the United States Supreme Court to, in effect, direct Judge Dusher to do so. The Supreme Court denied that motion. Judge Dusher proceeded with the hearing. The record filed by Marino before us contains Judge Dusher's opinion embracing his findings of fact and conclusions of law, although the record fails to include a transcript of the testimony taken. It is

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[8] We have supplied the italics wherever the word "appears" is set forth in this footnote.

Referring to Marino, the confession of error stated "No attorney **appears** to have been appointed for him on April 24." The confession of error also stated that at the hearing of March 5, 1947, by the Circuit Court on petitioner's petition for habeas corpus. "the following additional facts * * * were adduced * * *:

> No plea of guilty ever **appears** to have been entered before the trial court in petitioner's trial and it **appears** that the waiver on record purportedly signed by the petitioner was, in fact, not signed by him.
>
> Further, it **appears** that the petitioner was only eighteen years old at the time of his original trial, that he had entered the United States from Italy, his native land, only two years prior to his trial and that at the time of his trial he did not understand the English language and it is doubtful that he understood American trial court procedure.
>
> Finally, it **appears** that Daniel Torrisi, the person who appeared as interpreter for the petitioner at his original trial, was in fact the police officer who arrested the petitioner.
>
> Torrisi testified at the **habeas corpus** hearing and alleged that there was another interpreter by the name of Joseph Carrado, who explained to the petitioner his rights. However, the record fails to disclose Carrado as an interpreter."

The document filed by the attorney general was not under oath and was not accompanied by any affidavits, depositions or transcript of proceedings, and probably was not required to be, as a matter of procedure.

[9] **Marino v. Ragen**, 332 U. S. 561.

apparent from Judge Dusher's findings that he not only considered the common law record and the judge's docket covering the murder case, but also heard various witnesses, including attorney North. Because Judge Dusher felt that the conversations between Marino and attorney North were privileged and because Marino did not want North to testify in regard thereto, Judge Dusher did not require North to do so.

The verified allegations of Marino in his petition for habeas corpus are to the effect that he did not sign the waiver of trial by jury, that the arresting officer served as an interpreter for petitioner "at the trial," that he was not given any papers of any kind, that he was not warned of the consequences of the plea of guilty, that the court used biased interpreters, that he was without the advice of counsel from the date of his arrest until he entered prison and that he did not competently, intelligently, or understandingly enter a plea of guilty and that for these reasons he was denied a fair and impartial trial. In view of these allegations, the court was required to test the credibility of Marino, in the light of contrary facts appearing in the court's common law record, the judge's docket and the testimony of witnesses. Finding that Marino had on various occasions given radically different versions as to the killing for which he was indicted, the court came to the conclusions that he was not a credible person and that his aforesaid allegations were false.

1. In this court Marino's counsel state their argument as follows:

> "Where the Attorney General of the State of Illinois has confessed error and admitted that a person convicted of a crime 'was denied the due process of law which the Fourteenth Amendment requires' and the Supreme Court of the United States has so found, such finding is *res adjudicata* and binding on the lower Court, and the person is entitled to a trial *de novo* and not to a hearing as to whether the Supreme Court finding is correct."

The decision in *Marino* v. *Ragen*, 332 U.S. 561, was based upon the attorney general's confession of error which ad-

mitted allegations of fact and "consented" to a reversal of the judgment below. Viewed in light of the confession of error and the statements of facts which were undisputed in the Supreme Court proceeding, that court concluded that Marino was denied the due process of law which the Fourteenth Amendment requires. It did not however reverse the judgment below, but vacated that judgment and remanded the case. It was in the circuit court that evidence was thereafter taken, the facts judicially ascertained and a new judgment entered holding against Marino's contentions. The Supreme Court refused to review that judgment[10].

The confession of error served its purpose, but its effect was not all-inclusive or conclusive as Marino's counsel now contend. The function of the court when such a confession of error is presented in a criminal case is clearly set forth in *Young* v. *United States,* 315 U. S. 257, at 258, where the court said:

> "The Government confessed error and we brought the case here. 314 U. S. 595.
>
> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. See *Parlton* v. *United States,* 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judgment are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties. Cf. *Rex* v. *Wilkes,* 4 Burr. 2527, 2551, 98 Eng. Rep. 327; *State* v. *Green,* 167 Wash. 266, 9 P. 2d 62."

[10] **Marino v. Ragen, 336 U. S. 969.**

The public interest in the *Marino* case was entrusted to the consideration and protection of the United States Supreme Court as well as to the Illinois attorney general. In the performance of its duty in that regard that court vacated the judgment in habeas corpus and remanded the case to the circuit court, when then proceeded to ascertain the controlling *facts*. Even if the attorney general's confession of error had positively asserted facts, rather than merely setting out what the facts "appeared" to be, the result would have been the same. The method of determining the real facts remained under the control of the Supreme Court. Inasmuch as the attorney general suggested that the United States Supreme Court reverse the judgment of the Winnebago County Circuit Court in the habeas corpus proceeding, we interpret the action of the Supreme Court in vacating the circuit court judgment and remanding the cause to mean that that court was not then making a final decision, but anticipated further proceedings during which the controlling facts would be determined by the circuit court[11].

2. Congress[12] has expanded the rights of a petitioner for habeas corpus. *Johnson* v. *Zerbst*, 304 U. S. 458, at 466, citing *Frank* v. *Mangum*, 237 U. S. 309. In the latter case the court said, at 329:

> "It is objected by counsel for appellee that the alleged loss of jurisdiction cannot be shown by evidence outside of the record; that where a prisoner is held under a judgment of conviction passed by a court having jurisdiction of the subject-matter, and the indictment against him states the case and is based upon a valid existing law, *habeas corpus* is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was convicted."

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[11] **White v. Ragen, 324 U. S. 760 (1945); Woods v. Nierstheimer, 328 U. S. 211 (1946); Carter v. Illinois, 329 U. S. 173 (1946); Foster v. Illinois, 332 U. S. 134 (1947); Marino v. Ragen, 332 U. S. 561 (1947); Loftus v. Illinois, 334 U. S. 804 (1948), 337 U. S. 935 (1949); Young v. Ragen, 337 U. S. 235 (1949); Jennings v. Illinois, 342 U. S. 104 (1951).**

[12] **28 U. S. C. A. § 2243.**

The court then points out that the statute[13] changed the common law, adding:

> "The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, * * * and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.' * * * it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him."[14]

Guided by these principles we now consider the case before us.

3. While Marino's plea of guilty does not appear upon the common law record kept by the clerk of the court, it does appear in the trial judge's docket. That is sufficient. In *The People* v. *Nierstheimer,* 396 Ill. 193, at 197, the court said:

> "It is true that a part of the judgment as entered by the clerk does not truly reflect what is shown by the judge's minutes; however, the entire record will be searched and interpreted and a deficiency in one place will be cured by what appears in another. (*People* v. *Woodward,* 394 Ill. 433; *People ex rel. Ewald* v. *Montgomery,* 377 Ill. 241.) The commitment was in accordance with the provisions of the existing statute, (Smith-Hurd Stat. 1929, chap. 23, pars. 94 and 99), and the judge's minutes clearly show that this was the judgment of the court."

In that case certiorari was denied by the United States Supreme Court, 330 U. S. 841.

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[13] 28 U. S. C. A. § 2243.

[14] A review of the cases on this point may be found in **Hawk v. Olson,** 326 U. S. 271, at 274.

4. The common law record and the judge's docket dispute Marino's contentions that he was not given a copy of the indictment and a list of witnesses, that he was not warned of the consequences of a plea of guilty and that he did not understandingly enter such plea. From the evidence which Judge Dusher heard, he found in effect that these records state the truth.

5. The allegation in Marino's petition that the court did not appoint counsel to represent him is true, but his statement that he was without the advice of counsel from the date of his arrest until he entered prison, Judge Dusher found, as a matter of fact, to be false. He found from the evidence heard before him that a day after Marino's arrest the latter's friends hired attorney North to represent him and that on at least two occasions prolonged conferences between Mr. North and Marino occurred. He found that the attorney's retainer continued until the sentencing of Marino. Judge Dusher described Mr. North as one of the best and most prominent lawyers in the northern part of Illinois. Marino's objection kept from the record the substance of his conversations with his attorney. Whatever those conversations were, the record does not show that the attorney appeared personally in court during subsequent proceedings culminating in the sentence.

The sixth amendment of the federal constitution says nothing about an actual court appearance of counsel. It says that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." While it is customary for counsel for a defendant in a criminal case to appear in court, his appearance there merely indicates that he believes that he will thus further the interests of his client. Such appearance is not constitutionally indispensable. If competent, retained counsel, assisting defendant, believes that a plea of guilty should be entered and sentence imposed in the manner in which it occurred in this case, there is no infringement of defendant's rights under the sixth or fourteenth amendments of the federal constitution. As the court said in *Amrine* v. *Tines,* 131 F. 2d 827, at 833:

"Due process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. *The substance of due process may be denied although the accused is represented by a coterie of counsel,*"[15] "yet he may have it although unaccompanied by counsel.[16] Due process, or the lack of it, is based upon substance and not form. *Powell* v. *Alabama, supra; Norris* v. *State of Alabama,* 294 U. S. 587, 590, 55 S. Ct. 579, 79 L. Ed. 1074; *Avery* v. *State of Alabama,* 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Chambers* v. *State of Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716. *Lisenba* v. *People of State of California,* 314 U. S. 219, 236, 62 S. Ct. 326, 86 L. Ed. 166. In any event, the right to assistance of counsel is a personal right and may be waived, and if the accused is otherwise accorded a fair trial which embraces an opportunity to be heard, after due notice, he cannot complain of the failure to have counsel for his defense. *Johnson* v. *Zerbst, supra.*"

We are mindful that, according to Judge Dusher's finding based upon the evidence which he heard, Marino stated in open court that he did not want a lawyer and that he wanted to plead guilty and throw himself upon the mercy of the court. In view of what undoubtedly was attorney North's appraisal of the entire situation, we have no right to say that Marino was acting without the advice and assistance of North, even though North was not then present in court. It may well have been that North, in considering the heinousness[17] of the crime with which his client was charged, believed that the entry of a not guilty plea followed by a trial would result in a more severe punishment than what might be expected from a judge on a plea of guilty and a submission by the defendant personally to the mercy of the court. The sentence which was actually imposed on the plea of guilty tends to justify the

[15] As in **Powell v. Alabama, 287 U. S. 45, at 49.**

[16] These italics we have supplied.

[17] It appears from Marino's petition for certiorari that his victim was 77 years old. Marino's petition for habeas corpus filed in the Circuit Court of Winnebago County indicates that the victim was caretaker of a G. A. R. building.

attorney's judgment. It is well known to lawyers and judges in Illinois that juries are apt to inflict the death penalty or imprisonment for a long term of years for an offense where a young gunman meets an aged person, a stranger to him, on a public street, and without any apparent provocation shoots him to death. It is also known that under Illinois law a murderer who escapes the death penalty and receives a life sentence is eligible to parole in 20 years, while one who receives a sentence for a long term, such as 99, 150, 199 years, etc., is not subject to parole until he has served one-third of the term of the sentence[18]. Under the sentence of life imprisonment which Marino received he was eligible for parole in 20 years. He actually has been paroled for the last five years.

We cannot say that Judge Dusher was wrong in finding that Marino had the assistance of counsel. The counsel was selected and hired by Marino's friends and no charge has been made that he was incompetent or unfaithful. Moreover, from Marino's mouth in open court came the expression of his desire that he then did not want a lawyer and that he wished to throw himself upon the mercy of the court. No constitutional right was violated when he was permitted so to do. His constitutional right to the assistance of counsel was not violated. Marino had the assistance of competent counsel. On the record before us and in view of Judge Dusher's findings we are unable to hold that Marino acted without understanding, incompetently or unintelligently in the proceedings which led to his sentencing.

We are aware of such cases as *Johnson* v. *Zerbst*, 304 U. S. 458. In that case the defendant was arrested on November 21, 1934, indicted January 21, 1935, and on January 23, 1935 given notice of the indictment, arraigned, tried, convicted, sentenced all on one day, and lodged in the federal penitentiary on January 25, 1935, during all of which time he was unable to employ counsel for the trial. His plea was not guilty, and at all times he was without the assistance of counsel. Obviously, the case before us is fundamentally different, because not only was there no speedy disposition of this case but as a matter of fact Marino had the assistance of counsel.

[18] Sec. 795, Ch. 38, Ill. Rev. Stat. 1923.

6. Because the matter was not presented in this court, we might well ignore the charge in Marino's habeas corpus petition filed in the Circuit Court of Winnebago County on January 6, 1947 that "the record shows that * * * he did not persist in the plea of guilty." However, even if it were pressed upon us, the point is without merit because there is no showing in the record that he did not persist in said plea. Actually, the record shows no change of intention by Marino in regard to his desire to plead guilty but rather that such a plea was properly entered. In any event, if the record did show that he did not persist in his plea of guilty, that fact would be a basis for alleging error under the state law only[19]. No federal constitutional question is thereby raised.

7. It is urged that the Circuit Court of Winnebago County "used biased interpreters" in Marino's proceedings. The record shows that the court used as interpreters Daniel Torrisi and Joe Marino. Marino has at no time contended that Joe Marino was not a competent interpreter. His sole charge against him is a statement in the petition for habeas corpus that Joe Marino was a friend of Daniel Torrisi, one of the arresting officers, was not a relative or a friend of Marino and was not known to him. On the other hand, from the evidence adduced Judge Dusher ascertained that another interpreter, Manilli, served in that capacity when Marino conferred with attorney North, and also at the time of Marino's confession. There were also present at the time of Marino's confession four or five "Italians," including Joe Marino, Manilli and manager Corado of the telephone company. There is no specific charge or any evidence that any questions or explanations by the court, the state's attorney, or any other person, were on any occasion improperly translated to Marino or that any statement by Marino was improperly translated, even if it be assumed that Torrisi, the arresting officer, or Joe Marino should not have acted as interpreters. In the absence of such charge or evidence we have no right to base upon mere conjecture an inference that both of these men violated their duties as fair

[19] Sec. 756, Ch. 38, Ill. Rev. Stat. 1923.

interpreters. We do have a right to assume that the presiding judge who permitted them to testify exercised sound discretion in that regard and was justified in relying upon their services. The presumption that a presiding judge is conscious of what transpires in his presence and that he has a conscientious desire to administer justice faithfully is not to be so lightly brushed aside. There is no Illinois statute governing the selection of interpreters in criminal trials. Certainly Joe Marino was not *ipso facto* disqualified because he was not a relative or friend of the Tony Marino or known to him. If he had been it would tend to show his *lack* of impartiality.

Moreover, it appears from the confession of error of the attorney general that there was evidence before Judge Dusher that "there was another interpreter by the name of Joseph Carrado, who explained to the petitioner his rights. However, the record fails to disclose Carrado as an interpreter." Under the rule of *idem sonans*, it is reasonable to infer that Mr. Corado, the telephone company manager, heretofore referred to as one of the persons who interested themselves in Marino, was the "Carrado" to whom the attorney general referred. There is no requirement that the record should disclose him as an interpreter. If he did so act, it is an additional circumstance indicating that in the court proceedings Marino's rights were not infringed. Obviously, he was friendly to Marino. There is no contention that his translated explanation to Marino of his rights was incorrect.

For these reasons the judgment of the district court is

AFFIRMED.

MAJOR, *C. J.* dissenting. I regret I cannot give my assent even though the opinion evidences much thought and labor. The Supreme Court, in *Marino* v. *Ragen*, 332 U. S. 561, 562, made the following decision, "In the light of the confession of error [citing cases] and the undisputed facts, we conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires." The decision related to Marino's conviction in 1925, in the Circuit Court of Winnebago County, Illinois, on a charge of murder. [The inescapable effect of that decision was to void such judgment of conviction and to render it of no more force and effect than if it had been entered in the nighttime by the janitor of the county courthouse.] It followed as an inevitable result that the process by which Marino was confined in prison was also void.

The argument based upon cases such as *Young* v. *United States*, 315 U. S. 257, that the Supreme Court is not obligated to recognize a confession of error by law enforcement officials misses the point because in the instant case the court accepted such confession, relied upon it and rendered a decision on the issue as to whether Marino had been deprived of his constitutional rights. Of course, the Supreme Court and no other court is bound to render a decision on a confession of error or upon an agreement or stipulation of the parties, but when it does so its decision, so far as I am aware, carries no less weight than if it had been made on a complete record.

By the decision of the Supreme Court every vestige of the original proceeding in the state court was nullified, other than the indictment containing the charge. And by the Supreme Court mandate the state court had no alternative but to enter an order of discharge. Of course, at that time the State, if it so desired, could have taken Marino into custody and caused him to submit to another trial on the pending charge. In place of discharging Marino, however, the state court, without power or authority, proceeded to a hearing on the exact issue which had been decided favorably to Marino by the Supreme Court, that is, whether there had been a deprivation of his constitutional rights, and rendered a decision contrary to that of the Supreme Court.

[This unprecedented performance took place under the pretext that the court did not understand the mandate issued by the Supreme Court. Whatever infirmities might have resided in the mandate, it is hornbook law that a mandate must be construed in connection with the opinion or decision of the court of issuance. With the clear, distinct and direct language employed by the Supreme Court, it bears upon the preposterous to think that any Judge, any lawyer, in fact any layman, could have misunderstood the action called for by the mandate.]

[Apparently, however, smarting under the castigation administered by one of the members of the Supreme Court, the state court refused to execute the mandate. The action by that court which followed demonstrates not only a callous indifference to the decision of the Supreme Court but constitutes a scathing indictment of the honesty, integrity and good faith of the highest prosecuting official of the State. To the credit of the Illinois Attorney General, however, it should be noted that he, with courage and deference to the decision of the highest tribunal in the land, made a valiant effort to persuade the state court to follow and execute the mandate. No subterfuge was employed by that official as a pretext to do otherwise. As might be expected, he understood the decision of the Supreme Court, its mandate and what it called for.]

The Attorney General, when the State's Attorney of Winnebago County refused to act, filed before the state court a petition requesting that Marino be discharged or granted a new trial. After reciting the facts relative to the conviction of Marino (referred to by the Attorney General as the petitioner), that official stated:

> "Upon these undisputed facts, the Supreme Court of the United States has declared this petitioner was convicted of murder and sentenced to life imprisonment upon such conviction *in violation of his rights under the Constitution of the United States.*
>
> "In consequence of the premises, it became the duty of Max Weston, State's Attorney of Winnebago County, immediately upon the filing of the mandate

aforesaid, to appear before this Court and *move for the entry of a judgment order discharging the petitioner from the custody of the Warden of the Illinois State Penitentiary.* Max A. Weston, State's Attorney, *has failed and refused to do his duty in this regard.*

"The Attorney General of Illinois, on behalf of the People of the State of Illinois, makes this motion, not in the interests of petitioner as an individual, but because he considers that the violation of the Constitutional rights of any person is tantamount to an attack on the rights and freedom of every inhabitant of the State of Illinois.

"Wherefore the People of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, moves the Court to enter a judgment order *in accordance with the mandate* of the Supreme Court of the United States in this cause." (Italics supplied.)

Notwithstanding the solemn declaration by the Supreme Court and the courageous position of the Attorney General, the state court, not understanding the mandate, conducted a hearing, decided that Marino had not been deprived of any constitutional right and ordered him returned to prison. It thus reversed the decision of the Supreme Court. In my judgment, the order was entered arbitrarily and without power or authority. Neither it nor the proceeding from which it resulted should be given any consideration by this or any other court or tribunal.

Respondent in his brief, referring to the original judgment, argues, "That conviction remains on the official records of that court a valid and subsisting judgment," and whether it is right or wrong, that it is effective because it remains unreversed. To me, that is an astonishing as well as a spurious argument. The fact is that the parties before the Supreme Court in the instant proceeding were the same as those before the state court at the time of Marino's conviction, namely, the State of Illinois and Marino. The issue was the same as if it had been raised on appeal. I know of no reason and no law which would justify the nullification of a decision by the Supreme Court rendered under these circumstances.

Stripped of all the window dressing with which this case abounds, there emerges the simple issue as to whether Marino was convicted, in violation of his constitutional rights, of a crime involving moral turpitude, to-wit, murder. That issue has been decided in the affirmative by the Supreme Court of the United States. Such being the case, there never has been a lawful judgment of conviction standing against Marino. It is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation. I think that federal officials should renounce rather than embrace the grievous wrong which has been done Marino by Illinois officials.

I would reverse the order, and direct that the writ of habeas corpus be issued and that Marino be discharged.

JUDGMENT OF THE UNITED STATES DISTRICT COURT.

This matter came on before the court sitting without a jury upon writ of habeas corpus issued pursuant to the amended and substituted petition therefor, and the return of the respondent thereto; petitioner appearing in person and being represented by counsel, and the respondent being represented by the United States Attorney for the Northern District of Illinois; and the Court having heard oral argument by both sides, and having entered its findings of fact and conclusions of law in writing;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the writ of habeas corpus be dismissed, and that the petitioner be remanded to the custody of the respondent to be dealt with according to law.

It Is Further Ordered that the execution of this order be stayed for 60 days from the date hereof, and that the petitioner be permitted to remain at large under the $1000 bond to this court heretofore executed during the said 60 days, and in the event of an appeal by the petitioner, pending disposition of his appeal.

Done in Open Court, this 14th day of March, 1955.

Enter:

/s/ Walter J. LaBuy
Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT.

This cause coming on to be heard pursuant to the issuance of a writ of habeas corpus upon the amended and substituted petition of Tony Marino, petitioner herein, and the respondent's return thereto duly filed, and hearing having been had thereon;

And the Court having considered the facts set out in the amended and substituted petition for a writ of habeas corpus, the amended return thereto, and having heard argument of counsel thereon, the following Findings of Fact and Conclusions of Law are hereby made:

FINDINGS OF FACT

1. That petitioner Tony Marino is an alien and a native of Italy, residing within the City of Chicago, Illinois, within the jurisdiction of this court.

2. That the respondent Walter Sahli was the duly appointed, qualified, and acting Director of Immigration and Naturalization, with headquarters in Chicago, Cook County, Illinois.

3. That the petitioner Tony Marino entered the United States at New York City, New York, on the 11th day of November, 1923.

4. That on October 8, 1925, a warrant of arrest was issued by W. W. Husband, Second Assistant Secretary of Labor, charging that the Petitioner has been found in the United States in violation of the Immigration Act of February 5, 1917 for the following reasons: that he entered the United States by water at a time or place other than is designated by immigration officials; that he was a person likely to become a public charge at the time of his entry; and that he has been sentenced subsequent to May 1, 1917 to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: murder, committed within five years after his entry.

5. Pursuant to the warrant of arrest, the Petitioner was accorded a hearing to show cause why he should not be deported and on the evidence adduced at said hearing a warrant of deportation was issued March 2, 1926 directing his deportation to Italy on the charges in the warrant of arrest.

6. After the Petitioner was released from prison on or about July 6, 1950, the predecessor of the Respondent, Andrew Jordan, took him in custody and placed him on bond in the sum of One Thousand Dollars ($1000) pending his deportation.

7. On May 3, 1951, the surety was notified to deliver him to the predecessor of your Respondent, Andrew Jordan, for deportation. He was surrendered May 15, 1951 and immediately petitioned this Court for a Writ of Habeas Corpus which was granted.

8. On June 1, 1951, the predecessor to your Respondent, Andrew Jordan, filed a motion to quash the Writ of Habeas Corpus and dismiss the Petition. In said motion Andrew Jordan, predecessor to your Respondent, informed the Court that with the Court's permission the outstanding warrant of deportation would be withdrawn and a new hearing accorded the Petitioner in accordance with current laws and regulations. The motion was argued before Your Honor June 5, 1951 and Your Honor continued the case generally and authorized Andrew Jordan, predecessor to your Respondent, to accord the Petitioner a new administrative hearing on the warrant of arrest and completely process the case on the basis of the evidence adduced at the new hearing.

9. Accordingly, the Assistant Commissioner of Immigration and Naturalization filed a motion with the Board of Immigration Appeals to withdraw the warrant of deportation and reopen the hearing for the purpose of bringing the record up to date. The Board granted the motion and the hearing was reopened in Chicago, Illinois, August 21, 1951, before Hearing Officer Otto A. Eck.

10. That the reopened hearing was had on August 21, 1951, whereat the petitioner was represented by counsel of his choice.

11. That pursuant to a stipulation of facts entered into by and between the parties, by and through their respective counsel, the hearing officer prepared his decision, consisting of a discussion of the evidence, findings of fact, conclusions of law, and an order, finding the petitioner subject to deportation on the charge that on or after May 1, 1917, he had been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: murder.

12. That the record was reviewed by the Assistant Commissioner of Immigration and Naturalization who, on February 26, 1952, entered an Order, adopting the aforesaid recommended order of the Hearing Officer, and directing that the petitioner be deported from the United States in accordance with law.

13. That the petitioner appealed from the Assistant Commissioner's Order of February 26, 1952, to the Board of Immigration Appeals, which on June 23, 1952, affirmed the said Order.

14. That on August 26, 1952, the Assistant Commissioner entered an amended order correcting the charge to correspond with the charge in the Hearing Officer's order, which said charge had been incorrectly stated in the aforesaid Order of February 26, 1952.

15. That the Board of Immigration Appeals affirmed the Assistant Commissioner's amended order of August 26, 1952.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact it is concluded:

1. That the hearing accorded the petitioner on August 21, 1951, was fair, adequate, and conformed to due process of law.

2. That the finding of deportability, dated August 26, 1952, by the Immigration and Naturalization Service, and approved by the Board of Immigration Appeals on August 29, 1952, is supported by substantial evidence.

3. That there has been no application of an erroneous rule of law by the Immigration and Naturalization Service or the Board of Immigration Appeals in any of the deportation proceedings against the petitioner.

4. That the subsisting judgment of the Circuit Court of Winnebago County, State of Illinois, finding the petitioner convicted of the crime of murder committed on February 20, 1925, is not subject to collateral attack in this proceeding.

5. That the writ of habeas corpus issued herein should be discharged, the amended and substituted petition for writ of habeas corpus dismissed, and the petitioner remanded to the respondent to be dealt with according to law.

Done in Open Court, this 14th day of March, 1955.

Enter:

/s/ WALTER J. LA BUY
Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 698

UNITED STATES OF AMERICA EX REL. TONY MARINO, PETITIONER

v.

RALPH H. HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-22a) is reported at 227 F. 2d 886. The findings of fact and conclusions of law of the District Court (Tr. 140-144; Pet. App. 23a-26a) are not reported.

JURISDICTION

The opinion of the Court of Appeals was entered on December 6, 1955 (Pet. App. 1a) and a petition for rehearing was denied on January 5,

1956.[1] The petition for a writ of certiorari was filed on February 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is a lawful conviction of record upon which to predicate the order of deportation entered against petitioner.

STATUTE INVOLVED

Section 19 of the Act of February 5, 1917, 39 Stat. 889,[2] provided in pertinent part:

> That at any time within five years after entry, * * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.

STATEMENT

Petitioner has been ordered deported under Section 19 of the 1917 Act, *supra*, as a person who has been convicted of a crime involving moral turpitude committed within five years after entry, for which he has been confined in prison for a year or more (Tr. 126). Petitioner challenges his depor-

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[1] A copy of the denial of a petition for rehearing is part of the unnumbered record filed in this Court.

[2] Section 19 of the Act of February 5, 1917, was superseded on June 27, 1952, by Section 241(a) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. (1952 ed.) 1251(a).

tation in this habeas corpus proceeding, filed May 17, 1951, and asks that he be granted a full hearing as to the validity of the judgment of conviction upon which the deportation order is predicated and that he be discharged if it is found that his conviction is void (Tr. 131).

The pertinent facts may be summarized as follows:

On November 11, 1923, petitioner was admitted to this country from Italy for permanent residence (Tr. 41). On February 21, 1925, he was arrested on a charge of murder by the State of Illinois (Tr. 57). An indictment was returned against him on April 17, 1925, in the Circuit Court of Winnebago County, Illinois (Tr. 54). He was arraigned on April 21, 1925, and given a copy of the indictment and a list of witnesses and jurors (Tr. 59). The record shows that on April 23, 1925, in open court, the court fully advised petitioner, through two interpreters, Daniel Torrisi and Joe Marino, of the meaning and effect of a plea of guilty and the punishment which the court could render (Tr. 60). Included in the record of the same date is a typewritten statement bearing petitioner's signature in which it is stated that he enters a plea of guilty and waives a jury (Tr. 60-62). The trial judge's docket on April 23, 1952, also shows that petitioner entered a plea of guilty (Tr. 97). On April 24, 1925, the court heard evidence as to mitigating circumstances (Tr. 63) and on April 25, 1925, sentenced petitioner to life imprisonment (Tr. 64-65).

Counsel did not appear with petitioner at any of the court hearings.

On January 6, 1947, petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Winnebago County, Illinois, in which he alleged, *inter alia,* that he had been denied a fair and impartial trial (Tr. 70-95). After a hearing on March 5, 1947, the writ was quashed (See Tr. 157).

On petition for a writ of certiorari to this Court, the Attorney General of Illinois filed a confession of error and consented to a reversal of the judgment (Tr. 159-162). The Attorney General stated that it appeared that petitioner was eighteen years old at the time of his trial, had been in this country for only two years, could not understand the English language, and probably could not understand American trial procedure; that no counsel had been appointed for petitioner at the time of sentencing; that one of the interpreters appointed by the court was the arresting officer; that while there was evidence of another interpreter, Joseph Carrado, who explained to petitioner his rights, the record failed to disclose Carrado as an interpreter; that no plea of guilty was ever entered before the trial court; and that the waiver of the jury trial on record was not actually signed by petitioner (Tr. 159-162). In the light of the confession of error and the record, this Court concluded in a *per curiam* decision that petitioner was denied due process under the Fourteenth Amendment. It vacated the judgment quashing the writ and remanded the case to the Circuit Court of Winnebago

County, Illinois. *Marino* v. *Ragen*, 332 U.S. 561, 562-563.[3] The mandate remanded the cause to the state court "for appropriate proceedings in the light of the confession of error filed by the Attorney General of the State of Illinois" and "in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding" (Tr. 157-158).

The Attorney General of Illinois, construing the mandate to mean that petitioner should be discharged, made a motion to such effect before the Circuit Court of Winnebago County (Tr. 154-156). The state court, however, construed the mandate to mean that a full and complete hearing should be held on what actually transpired in the trial of petitioner and ruled that under the law of Illinois it could not discharge the defendant on habeas corpus (R. 96-97). The Attorney General of Illinois then filed a motion in this Court seeking to have the Court direct the state

[3] A concurring opinion was filed by Mr. Justice Rutledge in which Justices Douglas and Murphy joined. It was directed to the statement of the Attorney General of Illinois that in this case petitioner had pursued the proper state remedy, *i.e.*, habeas corpus. The opinion stated that, in habeas corpus proceedings from Illinois, the Court should not invoke its exhaustion of remedies requirement until Illinois afforded a reasonably clear and adequate means for presenting and disposing of questions involving federal constitutional rights. 332 U.S. at 563-570 (Tr. 106-111).

court to act in obedience to the mandate in *Marino* v. *Ragen*, 332 U.S. 561 (R. 147-152). At that time, the Attorney General fully explained the occasion for his motion (Tr. 149-152). He admitted that there was dispute in the record as to whether petitioner expressed his desire to waive trial by jury and pleaded guilty to the charge of murder (Tr. 150). However, he stated that "there is no doubt that petitioner's plea of guilty was recorded without his having been tendered counsel" (Tr. 150) and since "he was 18 years old and unable to speak English, it is not conceivable that his failure to demand counsel was a result of an intelligent relinquishment of a known right" (Tr. 150). The Attorney General explained that the Circuit Court of Winnebago County refused to discharge petitioner and had construed this Court's mandate to require an inquiry into the entire matter (R. 151). The motion of the Attorney General of Illinois was denied. 333 U.S. 852.

Meanwhile, the Circuit Court of Winnebago County heard evidence and considered the common law record and the judge's docket in petitioner's original trial (R. 96-102). It found that a clear preponderance of the evidence established that petitioner did sign the waiver of a jury (R. 97); and that the common law record together with the judge's docket showed that a plea of guilty was entered by petitioner (R. 97-98). It also found that numerous Italian friends called on petitioner in jail from the second day after his arrest (R. 100); that petitioner's friends retained

one of the best and most prominent lawyers in northern Illinois, Harry B. North, in his behalf (R. 98-99), and that this lawyer remained under the retainer until the day petitioner had his hearing on mitigation and aggravation (R. 99). Although petitioner denied having ever seen North, the Circuit Court of Winnebago County found that the evidence showed that petitioner spent two and a half hours with this attorney and an interpreter, one Manelli, on February 28, 1925, and two hours with them on March 2, 1925 (R. 98-99). Out of respect for the lawyer-client privilege and petitioner's wishes, the court did not inquire as to what transpired during these consultations (R. 98-99, 100). It found as an undisputed fact that some time before the hearing on mitigation petitioner said in open court that he did not want a lawyer, that he wanted to plead guilty and throw himself upon the mercy of the court (R. 99, 101). The court reasoned that "The actual appearance in court with a lawyer is in large measure a formality after the lawyer has advised the defendant concerning his rights. It seems to me that the vital thing is whether or not a defendant has had the advice of counsel previous to a plea of guilty" (R. 101-102). The court concluded that petitioner had had the benefit of counsel and had been accorded all of his constitutional rights (R. 102). The writ of habeas corpus was quashed, and the petitioner was remanded to the penitentiary (R. 102). A petition for certiorari to review this action was denied

on May 2, 1949. *Illinois ex rel. Marino* v. *Ragen*, 336 U.S. 969.[4]

On July 10, 1950, petitioner was released on parole after serving twenty-five years (R. 32), and was turned over to the immigration authorities on an outstanding warrant of deportation issued March 2, 1926, on the ground (among others) that he was deportable as a person who had been convicted of a crime involving moral turpitude committed within five years after his entry (R. 22). An administrative hearing was held on August 21, 1951, at which petitioner was represented by an attorney (R. 23-36). The hearing officer found that petitioner's conviction for murder remained on the public records of the State of Illinois and that petitioner was therefore subject to deportation (Tr. 115-166, 117-118). A deportation order was accordingly entered on September 12, 1951 (R. 118). The Assistant Commissioner of Immigration and Naturalization adopted the recommended order after a review of the record (R. 119). An appeal to the Board of Immigration Appeals was dismissed on the ground that the Immigration Service could not go behind the record of conviction, review the evidence, and render an independent judgment on the guilt or innocence of the alien (R. 122).[5] A warrant of deportation

[4] Petitioner suggests that the denial of certiorari was because this Court wanted him to pursue the new remedy then available to him under the Illinois Post-Conviction Act of August 4, 1949 (Pet. 11).

[5] Another appeal from an amended order of the Assistant Commissioner supplying a date (R. 124) was dismissed by the Board of Immigration Appeals on June 12, 1953 (R. 137).

was issued on October 10, 1952 (Tr. 16-17, 126). The present habeas corpus proceeding challenges the validity of the order of deportation.

The District Court for the Northern District of Illinois discharged this writ of habeas corpus (Tr. 145; Pet. App. 26a), and held that the subsisting judgment of the Circuit Court of Winnebago County was not subject to collateral attack in this proceeding (Tr. 144; Pet. App. 26a).

The Court of Appeals, Chief Judge Major dissenting, affirmed (Pet. App. 18a). It found that the Circuit Court of Winnebago County properly construed the mandate of the Supreme Court in *Marino* v. *Ragen,* 332 U. S. 561 (Pet. App. 10a-12a). Furthermore it considered the merits of the case and found that the Circuit Court properly decided that petitioner was accorded due process in his original trial (Pet. App. 13a-18a).

ARGUMENT

Petitioner has been ordered deported as an alien who within five years after entry committed murder, a crime involving moral turpitude for which he served twenty-five years in prison. His attack on that order is based on his contention that, while his conviction appears on the public records of the State of Illinois, it is, in fact, not a valid one. He argues, in effect, that the immigration authorities should have done what this Court had twice previously refused to do at his request, *i. e.,* construe its mandate in *Marino* v. *Ragen,* 332 U. S. 561, to mean that his original conviction was void and that he should have been discharged by the

state court. *Marino* v. *Ragen,* 333 U. S. 852; *Illinois ex rel. Marino* v. *Ragen,* 336 U. S. 969.

We think it is clear that the immigration authorities would not have been justified in refusing to recognize the validity of a judgment of the State of Illinois which the courts of that state, subject to review by this Court, had held to be valid and subsisting. Habeas corpus proceedings attacking orders of deportation do not open up for consideration the original judgment of conviction. *Pino* v. *Nicolls,* 215 F. 2d 237, 247 (C. A. 1);[6] *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369, 372-373 (C. A. 2), certiorari denied, 333 U. S. 876; *United States ex rel. Knauer* v. *Jordan,* 158 F. 2d 337, 339 (C. A. 7), certiorari denied, 331 U. S. 810; *Dengeleski* v. *Tillinghast,* 65 F. 2d 440, 441 (C. A. 1); *United States ex rel. Robinson* v. *Day,* 51 F. 2d 1022-1023 (C. A. 2); *Gib* v. *Weedin,* 8 F. 2d 489, 490 (C.A. 9). This is both reasonable and practical. To hold that the Immigration and Naturalization Service cannot rely upon the record of a conviction found in the public papers of a state would saddle it with the judicial task of appellate review of all convictions upon which deportation orders are based. As the First Circuit said in *Pino* v. *Nicolls,* 215 F. 2d at 243, " * * * Congress did not impose upon the Attorney General the impossible administrative burden of ascertaining *de novo* whether the alien in fact was guilty of the offenses of which he had been legally convicted."

[6] Reversed in a *per curiam* decision on the ground that the conviction had not reached a sufficient degree of finality to support a deportation order. 349 U.S. 901.

We do not even have in this case the issue of whether a judgment of a state court, not theretofore attacked in the state courts, can be questioned in immigration proceedings on the ground that it had been secured in violation of constitutional rights. This judgment was vigorously attacked in the state courts and before this Court, both before and after the original decision in *Marino* v. *Ragen*, 332 U.S. 561; after that decision, the judgment of conviction was expressly held to be valid and subsisting, and this Court declined to review that holding. Under these circumstances, we submit that the immigration authorities, in ruling on petitioner's deportability, and the federal courts, in reviewing the order of deportation, were required to treat the judgment as valid. If there still is, after all the prior proceedings, any basis for attacking the judgment of conviction, it must be by a proceeding to which the State of Illinois is a party.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

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Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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Counsel for respondent correctly state the issue to be whether there is a lawful conviction of record upon which to predicate the order of deportation in this cause.

But, thereafter counsel blandly assume the very question at issue, namely that there is a lawful conviction and that therefore petitioner is making a collateral attack on the judgment of conviction and sentence entered by the Circuit Court of Winnebago County on to-wit, April 25, 1925.

Petitioner is not making a collateral attack on the judgment of the Circuit Court of Winnebago County. It is respondent who is making a collateral attack on the finding and judgment of this Court in *Marino* v. *Ragen*, 332 U.S. 561, which held specifically that Marino had been denied "due process" by the Circuit Court of Winnebago. Counsel for respondent argue, just as Judge Dusher of the Circuit Court of Winnebago County argued, that this Court was wrong, that Marino actually did get a fair trial, that Marino was not entitled to a new trial or a discharge. Yet this Court plainly stated in *Marino* v. *Ragen*, 332 U.S. 561, at page 565:

> "This case presents a flagrant example of deprivation of due process."

Are this Court's words to be ignored and are Judge Dusher's prejudice and preconceived opinions to be given precedence over the rulings of this Court? Chief Judge Major in his dissenting opinion expresses our view in 227 Fed. (2d) 896, at page 899:

> "Notwithstanding the solemn declaration by the Supreme Court and the courageous position of the Attorney General (of Illinois), the state court not understanding the mandate, conducted a hearing, decided that Marino had not been deprived of any constitutional right and ordered him returned to prison. *It thus reversed the decision of the Supreme Court.* In my judgment, the order was entered arbitrarily and without power or authority. Neither it nor the proceeding from which it resulted should be given any consideration by this or any other court or tribunal." (Italics ours)

Counsel for respondent mistakenly argue that this Court twice refused to review the action of the Circuit Court of Winnebago County. (Respondents' Brief, page

9). In *Marino* v. *Ragen,* 333 U.S. 852, the Attorney General of Illinois filed a motion for this Court's instructions to the Circuit Court of Winnebago County. This motion was denied because it was premature. The motion was made before the Circuit Court of Winnebago had acted. Secondly, Marino had not exhausted his remedies in the state courts. This Court is not in the habit of acting on motions by various parties as to the meaning and import of its decisions. Certainly, this Court was not passing upon the propriety of the Winnebago Court action.

Similarly, in *Marino* v. *Ragen,* 336 U.S. 969, Marino again filed a premature petition for certiorari without exhausting his remedies in the Illinois Courts under the new Illinois Post-Conviction Statute and by appeal or mandamus in the Illinois Supreme Court. Marino's procedure was bad but surely this Court did not even purport to pass upon the merits of petitioner's case. Indeed, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge were of the opinion that certiorari should be granted despite the procedural defects.

We submit that this Court has never passed upon the validity or legality of Judge Dusher's arbitrary action against Marino. Nor has this Court passed upon the question as to whether its decision in *Marino* v. *Ragen,* 332 U.S. 561 takes priority over the decision of Judge Dusher in remanding the petitioner to the penitentiary.

The record in this case shows a judgment of conviction and then a finding by this Court that such judgment was unconstitutional and void because obtained in violation of due process of law. Manifestly this is not a collateral attack unless it can be said that respondent and the majority of the Court of Appeals are making a collateral attack on *Marino* v. *Ragen,* 332 U.S. 561.

It is significant that the cases cited in respondent's brief at page 10 are irrelevant and far fetched. In *Pino* v. *Nicolls,* 215 Fed. (2d) 237, there were two legal convictions.

In *U. S. ex rel. Weddeke* v. *Watkins,* 166 Fed. (2d) 369 there was a legal, unreversed judgment of record at the time of the deportation proceedings and the alien was seeking a delay to subsequently attack the judgment of conviction. That is wholly different from the case at bar.

In *U. S. ex rel. Knauer* v. *Jordan,* 158 Fed. (2d) 337, an alien whose naturalization as a citizen had been revoked because of fraud practiced in its procurement was ordered deported. His denaturalization had been affirmed by the Court of Appeals and this Court denied certiorari. He now sought to attack the denaturalization judgment again in the deportation proceedings. Of course, the court refused to permit him to do so. But this case is utterly different from the case at bar.

In *Dengeleski* v. *Tillinghast,* 65 Fed. (2d) 440, there was a valid judgment that the alien had been convicted of managing a house of prostitution. No attack had been made on the legality of the conviction. How this case is pertinent is difficult to comprehend.

U. S. ex rel. Robinson v. *Day,* 51 Fed. (2d) 1019, insofar as it is at all germane, supports the contention of the petitioner rather than that of respondent. In this case there were two sentences but only one judgment of conviction. The Court held the alien was not deportable.

Finally, *Gib* v. *Weedin,* 8 Fed. (2d) 489 is cited. In that case, an alien was convicted of a crime. No appeal was ever taken. Subsequently, in the deportation proceedings against him, he argued that the indictment in the original

criminal conviction action was defective and untenable. Of course, such a defense was unavailable in the deportation action.

These are the only cases cited by respondent. None is even remotely pertinent.

Counsel for respondent further argues on pages 6-8 of their brief that, after all, Judge Dusher did conduct a further hearing and did find that Marino did get a fair trial. We submit that in our petition for certiorari we showed how Marino did not and could not get a fair trial; that no counsel represented him; that he could not read, write or understand English; that he was not advised of his rights; that he did not sign the plea of guilty; that the arresting officer, Torren, was the interpreter and numerous other violations of legal rights.

But at this stage whether respondent's contention or petitioner's contention is correct is irrelevant. What is relevant and conclusive is that this Court found in *Marino* v. *Ragen,* 332 U.S. 561 that petitioner did not receive a fair trial and was denied due process of law. Neither Judge Dusher nor petitioner nor respondent nor respective counsel nor the Court of Appeals can change this Court's finding and decision. This fact should be beyond cavil.

To be sure, the Immigration authorities are bound by a valid judgment of conviction. By the same token they are bound by a United States Supreme Court decision that a judgment of conviction is invalid and unconstitutional. The latter represents the state of the record in this case.

Any subsequent tampering with the record by Judge Dusher *sua sponte* or by any one else holding further hearings can have, in the words of Chief Judge Major, "no more force and effect than if it had been entered in the nighttime by the janitor of the county courthouse."

Despite respondent's bold assertions on page 11 of his brief, we state categorically that Judge Dusher's actions subsequent to the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561 have never been directly reviewed or passed upon by this Court.

CONCLUSION.

The record in this case shows no legal conviction of record. Hence an order of deportation cannot be predicated thereon. Marino has suffered thirty years of agony in violation of his constitutional rights. Since his release on parole he has been an honorable, useful, desirable member of the community. It would result in a grave miscarriage of justice to permit the deportation order to stand. As succinctly stated in Judge Major's dissent (page 900):

> "It is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation."

It is most respectfully and sincerely urged that the petition for a writ of certiorari be granted and that therefore the order of the Court of Appeals be reversed and the petitioner discharged.

Respectfully submitted,

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